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In the Supreme Court of the United States

OCTOBER TERM 1945

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

A. J. TOWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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No. 950

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

A. J. TOWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the First Circuit entered on December 13, 1945 (R. 111), refusing to enforce an order issued by the Board against A. J. Tower Company and remanding the cause to the Board with directions to make an additional finding of fact.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 101–110) is reported at 152 F. 2d 275. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 9–15) are reported at 60 N. L. R. B. 1414.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on December 13, 1945 (R. 111). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board, after a union has received a majority of the votes cast in an election held in accordance with the regulations of the Board to determine the bargaining agent of certain employees, may, without examining into the merits of a post-election challenge to the eligibility of a voter in the election whose ballot may have been essential to the result, properly find that the employer has committed an unfair labor practice by refusing to bargain with the union.

2. Whether a regulation of the Board to the effect that after a petition to investigate and certify under Section 9 (c) of the Act has been filed the parties may, with the approval of the regional director, enter into a consent election agreement, in which event the rulings of the regional director on the conduct of the election and the eligibility of voters shall be final, as applied by the Board to mean that all rulings of the regional director on such matters are final unless arbitrary and capricious, is valid.

3. Whether, if the above regulation is valid, it was arbitrary and capricious for the regional director to rule that the employer was precluded from questioning the employee status of a person who voted in an election conducted by secret ballot where the employer included that person's name on the list of those eligible to vote, had in his possession prior to the election the information on the basis of which he challenged the status, permitted all of the votes to be cast and commingled without challenging any, and waited until the results of the election were announced to raise the question of eligibility.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act and of the Rules and Regulations of the National Labor Relations Board are set forth in the Appendix, *infra*, pp. 27–30.

STATEMENT

The Representation Proceeding

On April 24, 1944, Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies Garment Workers Union, A. F. of L., herein called the Union, filed with the Board (in a proceeding designated by the Board as Case No. 1–R–1880) a petition for investigation and certification of representatives under Section 9 (c) of the Act, seeking exclusive representation of certain employees of respondent (R. 34, 53, 55–

56). On April 27, 1944, an agreement for a "consent" election in accordance with Article III, Section 12, of the Board's Rules and Regulations, Series 3, effective November 26, 1943 (*infra*, pp. 29–30) was entered into between the employer and the Union and approved by the Board's regional director. The agreement provided that an election by secret ballot should be conducted under the supervision of the regional director, to determine whether respondent's employees desired to be represented by the Union (R. 34, 53, 57–59). This agreement provided that the election be held on May 5, 1944, among the employees at respondent's Roxbury plant in the unit defined in the agreement. It provided that (R. 34, 57):

> Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board, provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election.

The agreement also provided that (R. 34, 57–58):

> The eligible voters shall be those employees included within the Unit, who appear on the Employer's pay roll for the period indicated below, including employees

> who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, * * * but excluding any employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election. At a date fixed by the Regional Director, the Employer will furnish to the Regional Director an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

The pay-roll period for determining eligibility was designated as April 21, 1944.

Pursuant to the terms of the agreement, on May 1, 1944, respondent submitted to the regional director an eligibility list of the employees in the unit involved (R. 34–36, 37, 41, 65). Included on the list, with the notation "Out Sick", was the name of Jennie A. Kane (R. 37, 41), who had last worked for respondent on March 24 (R. 37).

The balloting took place on May 5, 1944 (R. 34, 53), at which time Jennie Kane cast a vote unchallenged by either the Union or the Company observers who were present at the polls and during the counting and tabulation of ballots, and her ballot was therefore commingled with the others (R. 34, 53, 65–66). One of the Company observers was a pay-roll clerk in the factory office (R. 47). A "Certification on Conduct of Election" was signed by the representatives of re-

spondent, the Union, and the Board, certifying that the balloting had been held, that it was fairly conducted, and that all eligible voters were given an opportunity to cast their ballots in secret (R. 34, 60, 66). Following the counting of the ballots, all the parties signed a "Tally of Ballots", which disclosed that out of 230 valid votes counted, 116 had been cast for the Union and 114 against it, and that 1 ballot had been challenged by the Union. The regional director certified that a majority of the ballots had been cast for the Union and that there were not challenges sufficient in number to affect the results of the election. The observers for the Company and the Union certified that the counting and tabulating were fairly done and that the results were as reported by the regional director (R. 34, 53, 61–62, 66).

On May 9, 1944, respondent, through its counsel, wrote the regional director that it had just received information that Jennie Kane was not an employee of the Company at the time of the election and that it was therefore challenging her right to vote in the election and the ballot cast by her. The Company requested that, in view of this challenge, the regional director rule on the ballot previously reported as challenged in the tally and upon Kane's vote (R. 34, 48, 53, 63–64, 66, 70–71). This procedure could have resulted in a tie vote, with the Union falling short of a majority, if the Union's challenge were overruled

and the ballot in question were cast against the Union, and if Kane were declared ineligible to vote and her vote were assumed to have been for the Union.

A conference for the purpose of considering these objections was held on May 12, 1944, and a hearing on the objections was conducted under the auspices of the regional director on May 22, 1944, at which representatives of respondent, the Union, and the Board were present (R. 34, 53). At this hearing, respondent, in support of its contention that Kane was not an employee at the time of the election, introduced a notice sent to it on May 1, 1944, by the Massachusetts Division of Employment Security, of a claim for unemployment benefits filed by Kane on April 28, 1944, in which she had stated that she had left the employ of respondent in March 1944 (R. 39, 72–73). Respondent did not deny that it had received this notice several days prior to the date of the election (R. 43–45), although its plant superintendent stated that the matter had not come to his attention until after the election (R. 39, 40, 44). Respondent stated that it had also learned that on April 28, Mrs. Kane had placed her name on the list of the United States Employment Service as available for work (R. 38). Respondent also submitted a written statement signed by Mrs. Kane on May 8, 1944, stating that she had voted for the Union in the election (R. 34, 64, 86, 98).

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An agent of the Board interviewed Mrs. Kane on May 23, 1944 (R. 34, 64). She told him that she considered herself an employee of the respondent at the time she voted and still considered herself an employee (R. 34, 64). She explained that she had been ill and had applied for unemployment benefits in the belief she was entitled to them while she was ill and that she did not know applying for such benefits would be considered as quitting respondent's employ because she intended to return to work at the Company as soon as she was able (R. 34, 65).

On May 24, 1944, the regional director issued his "Report on Objections,"[1] in which he ruled that "although the question of Mrs. Kane's status as an employee is not quite clear, * * * under the circumstances set forth, the Company has waived its right to challenge her vote or to object to the election on this ground" (R. 34, 66). The circumstances which governed his ruling were set forth as follows: The eligibility list had been prepared solely by respondent and had been submitted by it as the exclusive list of eligible voters. Respondent alone knew the facts as to Kane several days before the election but had made no attempt to correct the eligibility list. Respondent's observers failed to challenge Kane's right to vote when she presented herself at the polls and they signed the usual certification on the

[1] One paragraph was amended on May 31, 1944 (R. 34, 67).

conduct of the election after the voting. Respondent thus acquiesced in Kane's voting until 4 days after the election, when for the first time it came forth with a fact "peculiarly within the Company's knowledge" (*ibid.*). "To hold otherwise would vitiate the Board's procedure of having observers present at the polls, and challenges by such observers, and of certifications of conduct by the parties." This determination made it unnecessary for the regional director to comply with respondent's request that he rule on the ballot previously challenged at the polls, since it could not affect the clear majority of the Union. The regional director thereupon found that the Union had received a majority of the valid votes cast and that it was, therefore, pursuant to the consent election agreement of the parties, the exclusive representative of all the employees in the appropriate unit (R. 34, 53, 66–67).

The Unfair Labor Practice Proceeding

On June 9, 1944, the Union filed with the Board (in a proceeding designated by the Board as Case No. 1–C–2416), a charge alleging that the respondent had refused to bargain collectively with it (R. 16). The Board thereupon issued its complaint against respondent, and respondent answered admitting that it had refused to bargain collectively with the Union but denying that the Union had ever been designated by a majority of the employees in the appropriate unit (R. 33,

50–51). The answer asserted that the results of the consent election of May 5, 1944 could not be relied on as establishing the Union's representative status because Mrs. Kane's vote had been counted improperly (R. 33, 50–57).

After the usual proceedings, the Board on March 23, 1945 issued its findings of fact, conclusions and order (R. 9–15), holding that the regional director's ruling that the respondent could not for the first time challenge the vote of Mrs. Kane after the results of the election had been announced was neither arbitrary nor capricious and therefore would not be disturbed. The Board pointed out that quite apart from the effect of the consent election agreement, the Board itself would have reached the same conclusions as the regional director respecting Mrs. Kane's vote (R. 11). The position of the Board respecting such post-election challenges is stated in its decision as follows (R. 11):

> We have consistently adhered to the salutary doctrine of not considering post-election challenges because of our belief that otherwise an election could be converted from a definitive resolution of preference into a protracted resolution of objections disregarded or suppressed against the contingency of an adverse result. Moreover, a post-election challenge forecloses identification of the ballot which would otherwise have been segregated. Since the challenged ballot may have been

> cast against the Union, [evidence as to how it was cast being unacceptable,] it would be necessary, in order to sustain such a challenge, to set aside the election even though a majority of the valid votes have been cast for the Union. We do not believe it to be sound administrative practice to overturn an election under these circumstances when such a result flows from the fault of the objecting party.

The Board therefore entered an order requiring respondent to cease and desist from its unfair labor practice and to take the affirmative action of bargaining collectively with the Union (R. 11–12).

Upon the Board's petition for enforcement of its order, the court below construed the statute as making it a jurisdictional prerequisite to any determination that an employer has committed the unfair labor practice of refusing to bargain collectively, that the union with which he has refused to deal should have been chosen by a majority of the employees voting (R. 106). The court therefore concluded that under the facts of the case "the Board had no jurisdiction to find the Company guilty of violating Section 8·(5) in the absence of a finding that Mrs. Kane was an employee on the date stipulated" (R. 107). It accordingly set aside the Board's order and remanded the cause to the Board for further proceedings not inconsistent with its opinion (R. 110).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In construing the National Labor Relations Act as making it a jurisdictional prerequisite to any determination that the respondent committed the unfair labor practice of refusing to bargain collectively, that the Board find that Mrs. Kane was in fact an employee on the date she cast her ballot in the election conducted by the Board's regional director.

2. In holding that although there is no reliable method of determining for whom Mrs. Kane voted, since her ballot was commingled with the other 230 ballots, the court must assume she voted for the Union.

3. In holding that the Board must consider the post-election challenge of Mrs. Kane's eligibility to vote in the election.

4. In holding that the Board could not give effect to the consent election agreement entered into between the Union and the respondent insofar as it made the rulings of the regional director on all questions as to the conduct of the election final and binding.

5. In holding that the Board could not treat the regional director's ruling that respondent, by failing to challenge Mrs. Kane's right to vote prior to the time her ballot was commingled, had waived its right to question her eligibility, as final and binding.

6. In holding that the Board was required to go behind the finding of the regional director, made under the terms of a consent election agreement entered into between the Union and the respondent, that the Union is the exclusive representative for purposes of collective bargaining of the employees in the unit specified in the consent election agreement.

7. In holding that the Board must determine whether Mrs. Kane was an employee of the respondent on the eligibility date and on the date she voted.

8. In setting aside the Board's finding that the Union was the exclusive representative for purposes of collective bargaining of the respondent's employees in an appropriate unit.

9. In setting aside the Board's finding that the respondent had committed an unfair labor practice by refusing to bargain collectively with the Union.

10. In setting aside and refusing to enforce the Board's order.

REASONS FOR GRANTING THE WRIT

I

The holding of the court below substantially impairs the ability of the Board to administer the National Labor Relations Act in situations which require elections to determine collective bargaining representatives. Such elections can be successfully conducted and the duty of employers to

bargain with employee representatives chosen in elections can be enforced only if finality may be given to the election results reached. The court below did not pass upon the validity of the Board's regulations or the consent agreement under which the election here was held, but decided that the end-purpose of the entire process of designating employee representatives—namely, collective bargaining between the employer and those representatives—can be compelled only if the Board undertakes an examination into the merits of post-election challenges by the employer to the eligibility of employees voting in the election whose vote may have been necessary to the result, and makes findings with regard to their eligibility. Such a procedure would involve reopening matters supposedly settled in the election proceedings.

Nothing in the Act compels this result. On the contrary, the Board's authority under Section 9 (c) to conduct an election to determine bargaining representatives, coupled with its power under Section 6 to prescribe regulations to carry out the provisions of the Act, gives validity to election results reached under its regulations; and a cease-and-desist order under Section 10 (c), occasioned by an employer's refusal to bargain collectively with the representatives of his employees in violation of Section 8 (5), may, we submit, give effect to those results, provided the Board's regulations are not arbitrary. The contrary conclusion of the court below imposes hampering

prerequisites upon the enforcement of an important category of Board orders and casts doubt upon the validity of the Board's usual election procedures, which are employed in thousands of cases annually and which we believe to be reasonable and valid. It conflicts, moreover, with the decision of the Circuit Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *Capitol Greyhound Lines,* 140 F. 2d 754, certiorari denied, 322 U. S. 763, which enforced a Board order in the face of a similar attack. We believe, therefore, that the instant decision should be reviewed by this Court.

As has been stated (*supra,* p. 11) the court below placed its decision upon the ground that the National Labor Relations Board lacks jurisdiction to compel collective bargaining with a given union unless that union is found by the Board to have been chosen by a majority of the actual employees in the unit involved. The court in the *Capitol Greyhound* case, *supra,* held, on the other hand, that "if the Union was chosen as collective bargaining agent in conformity with due process under the National Labor Relations Act, the order of the Board [to compel the employer to cease and desist from refusing to bargain with the union] should unquestionably be enforced". (140 F. 2d at 755.) We submit that the latter view is the correct one. The language of Section 8 (5) of the Act, making it an unfair labor practice "to refuse to bargain collectively with the representatives of

* * * employees, subject to the provisions of Section 9 (a)", coupled with the provision of Section 9 (a) that "representatives designated or selected for the purposes of collective bargaining by the majority of the employees * * * shall be the exclusive representatives * * * for the purposes of collective bargaining", means representatives designated or selected according to procedures validly prescribed pursuant to the Act. These procedures must necessarily include provision for determining the eligibility of voters in elections and of giving finality to the results of elections which have been conducted under the procedures prescribed. If this is not so, the Board must hold itself in readiness to determine the merits of all challenges to the eligibility of voters, either before the election results are certified or afterward, at least in cases where the challenged ballots may determine the outcome of the elections. Such a procedure would be thoroughly impractical and, we submit, was not intended to be required by the Act.

While the court below expressly disclaimed any intention to pass on the validity of the procedures and the consent agreement under which the election in the present case was conducted or of the Board's interpretation of the agreement (R. 108), the necessary effect of its decision is to invalidate part of the Board's established machinery for conducting elections. The Board, on the other hand, held (1) that the regional director's refusal

in this case to allow the challenge was neither arbitrary nor capricious and accordingly was binding on the parties to the consent election agreement and (2) that the Board may properly bar post-election challenges in similar circumstances even though the parties have not entered into a consent election agreement. We think that both grounds of the Board's decision are valid.

The Board's consent election procedures have provided from the beginning, as did the agreement in this case, that the determination of the regional director shall be final and binding as to any question relating to the election, including questions as to the eligiblity of voters, raised by any party to the election. The Board has conducted approximately 16,436 consent elections under this procedure, 1513 of which have occurred during the forepart of the current fiscal year.[2]

[2] The following table shows the number of consent elections conducted by the Board, together with the report of the Board in which this information is made public:

	Number of consent elections
First Annual Report, p. 44	23
Second Annual Report, p. 29	217
Third Annual Report, p. 47	812
Fourth Annual Report, p. 51	481
Fifth Annual Report, p. 18	676
Sixth Annual Report, p. 36	1,732
Seventh Annual Report, p. 32-34	*3,050
Eighth Annual Report, p. 24	*2,755
Ninth Annual Report, p. 20	2,434
Tenth Annual Report	2,543
Current fiscal year	1,513
Total consent elections	16,436

*These figures include a number of payroll checks and stipulated elections.

Post-election challenges in Board-directed elections have been handled under what is in effect the same rule as governs consent elections, although in the one case the Board itself refuses to inquire into the merits of the post-election challenges on the ground that the failure to object prior to the announcement of the results is a bar to the challenge, and in the other case reaches the same result by giving effect to the finality of the regional director's ruling that he will not inquire into such challenge.[3] Invalidation of this method of handling post-election challenges would require a change in the Board's whole method of conducting elections. It is of major importance in the administration of the Act that this method be not overthrown by a mechanical application

[3] Post-election challenges based on ineligibility arose in the following Board-directed elections: *Matter of Cudahy Packing Co.*, 4 N. L. R. B. 39, 41; *Matter of Mahon Co.*, 9 N. L. R. B. 430, 431; *Matter of American Granite Finishing Co.*, 28 N. L. R. B. 739, 740; *Matter of Denver Publishing Co.*, 61 N. L. R. B. 338, 339; *Matter of Owens-Corning Fiberglas Co.*, 61 N. L. R. B. 546; *Matter of Harry Manaster & Bro.*, 61 N. L. R. B. 1373, 1374; *Matter of Chrysler Corp.*, 63 N. L. R. B. No. 132; *Matter of Norris, Inc.*, 63 N. L. R. B. No. 78. Post-election challenges based on ineligibility arose in the following consent elections; *Matter of Kellogg Switchboard and Supply Co.*, 28 N. L. R. B. 847, 852; *Matter of Capitol Greyhound Lines*, 49 N. L. R. B. 156. Post-election objections based on grounds other than ineligibility arose in the following Board-directed elections: *Matter of International Freighting Co.*, 6 N. L. R. B. 271, 272; *Matter of Solvay Process Co.*, 37 N. L. R. B. 983, 984; *Matter of Kilburn Mills*, 48 N. L. R. B. 1251; *Matter of Lane Cotton Mills Co.*, 9 N. L. R. B. 952, 956, enforced 111 F. 2d 814 (C. C. A. 5).

of Sections 8 (5) and 9 (a), which has regard neither to the general scheme of the Act nor to the practical requirements of administration.

The machinery which the Board has designed to enable it expeditiously to poll the large numbers of employees involved in the elections it holds, while containing safeguards designed to assure that no one will vote who is not eligible, operates on the premise that the Board will not actually determine the eligibility of any person to vote unless a challenge is made prior to the time his vote is cast and commingled. The lists of proposed voters are prepared a reasonable period before the election and are made available to all parties. All parties are permitted to have representatives present at the polls to challenge any voter.[4] Hence the vast bulk of those who vote are persons whose status either as employees or as workers within the appropriate unit[5] has

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[4] Although the Board at one time followed the practice of refusing to permit employer representatives to be present at the polls if any union objected (see *Southern S. S. Co.* v. *National Labor Relations Board*, 316 U. S. 31, 32, 33, 37; National Labor Relations Board, Third Annual Report, p. 147), for the past three years it has permitted the employer in all cases to have observers selected from among the nonsupervisory employees. See the election agreement in this case (R. 58), which is the standard form used by the Board, and the Board's *Field Manual*, Sec. 4.3.16.

[5] The principle enunciated by the court below would require the Board to determine the membership of an employee in the appropriate unit, equally with his employee status, if a post-election challenge as to such membership

never been the subject of any finding by the Board. If, as the court below holds, such a finding is a jurisdictional prerequisite to the validity of the Board's certification of a union, and cannot be waived or rendered unnecessary by failure to raise the issue in timely fashion, the Board will be required to alter its election machinery materially.

Nor does the asserted defect lend itself to easy correction. If the time of the commingling of the ballots cannot be said to be a proper point before which a challenge to the eligibility of a voter must be made, no subsequent point of time can be set with greater validity. The decision below is based upon a principle which would permit the issue of eligibility to be raised at any time, even in a complaint proceeding following the election. The Board's certification of a union would thus be final as against possible challenges to the majority only if the Board had entered into the laborious task of making inquiry and findings with respect to the status of every voter. The time and expense which would be consumed by such a change of procedure would mean an end of employee elections on the scale on which the Board has handled them in the past.

Any requirement that the Board actually determine the eligibility of those who have voted in

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were made; for Section 9 (a) of the Act renders the representatives of a majority of the "employees in a unit" the exclusive representatives for bargaining purposes.

an election opens the door wide to contests over the status of voters. In close elections it would be to the advantage of the losing union or the employer to raise issues and require proof as to the status of innumerable voters in the hope that doubt would be cast upon enough votes to require a new election.[6] Under the policy followed by the Board, numerous persons are eligible to vote even though they do not work on the day of the election, as for example employees temporarily laid off, or ill, or on vacation, or in the armed forces. The various attacks that could be made on the eligibility of such persons are apparent. Furthermore, if post-election challenges are permitted, the employer will be given a strong inducement to include on the pay-roll submitted the names of

[6] The court below held (R. 108) that the case must be determined upon the assumption that the challenged ballot was cast in favor of the Union. Under the court's reasoning, the Board would in all cases be compelled to assume that the vote was cast with the majority or else to inquire into the way it was actually cast. Neither alternative is acceptable, the former because it is unrealistic and the latter because it would involve an objectionable inquiry into voting which can properly be conducted only under the safeguards of secrecy. As the Board pointed out in its opinion in the instant case (R. 11), the employer's "invasion of the voter's privacy" by inquiring into the nature of his vote would "nullify the very purpose of the secret ballot" and should be regarded as an unfair labor practice. A similar inquiry by agents of the Board would be only slightly less objectionable. There is no feasible alternative, therefore, to invalidating an election if the number of voters found to have been ineligible equals or exceeds the majority by which the election was determined.

persons whose status as employees is dubious or non-existent in the hope that he can thereby invalidate the election. Thus, the dangers of allowing post-election challenges by employers to the employee status of persons included on the payroll are much greater than those which attach to post-election challenges in other types of elections, because of the peculiar relationship the employer bears to the preparation of the eligibility list.

The reasonableness of the Board's rule barring post-election challenges is supported by numerous cases involving political and corporate elections. While procedures vary, the device of a registration list which may not be corrected after a ballot has been commingled is generally held to be a reasonable means of insuring fair elections. See cases collected in *Constitutionality of Statutes in Relation to Registration before Voting at Election or Primary,* 91 A. L. R. 349, 358. Illustrative is *Moore* v. *Bay,* 149 Md. 286, 131 At. 459, in which the plaintiffs were not allowed to show that 170 of the persons who voted in a municipal election decided by a majority of less than 100 votes, although registered, were disqualified because they had not paid the required taxes. The court in its opinion called attention to the machinery for purging the registration rolls before the ballots were cast and commingled and ruled that failure to utilize this machinery barred the post-election

challenge. See also *Duplessis* v. *Harrell*, 9 La. App. 171, 119 So. 264; *Cambre* v. *Brignac*, 19 La. App. 437, 140 So. 702; *Turregano* v. *Whittington*, 132 La. 454, 61 So. 525; *Perez* v. *Cognevich*, 156 La. 331, 100 So. 444; *Bradley* v. *Neill*, 174 La. 702, 141 So. 382; *Hyde* v. *Brush*, 34 Conn. 454; *Re Port Arthur Provincial Election*, 14 Ont. L. 345; *Re McGrath*, 17 Ont. L. 514; *Re Schumacher*, 21 Ont. L. 522; *In re Chenango County Mutual Ins. Co.*, 19 Wend. (N. Y.) 635; *Rossing* v. *State Bank*, 181 Ia. 1013, 165 N. W. 254; 3 Fletcher, *Cyclopedia of Corporations* (Perm. ed.), p. 155.

II

Where, as here, the agreement under which an election is conducted gives finality to the decision of a designated individual with respect to any question affecting the election, an additional reason supports the validity of the procedure and of his decision that a post-election challenge may not be entertained. The rule is well settled that the parties to a contract may agree in advance to submit broad categories of questions to a designated person and that his decision, once arrived at, is final and binding unless fraudulent or arbitrary and capricious. *United States* v. *Mason & Hanger Co.*, 260 U. S. 323; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387; *Plumley* v. *United States*, 226 U. S. 545; *Martinsburg & Potomac R. Co.* v. *March*, 114 U. S 549; *Memphis*

Trust Co. v. *Brown-Ketchum Iron Works,* 166 Fed. 398, 403–404 (C. C. A. 6), certiorari denied, 214 U. S. 515. We think the Board's regulations may validly provide for an agreement which leaves procedural as well as fact questions relating to the election to the regional director; and such an agreement, once made, is binding in all respects. In this case the issues raised by the employer's challenge were submitted to the regional director and determined by him. Under any view, therefore, his decision should be given effect unless arbitrary or capricious.

The reasoning which supports the validity of the rule excluding post-election challenges to the eligibility of voters also sustains the regional director's determination in this case. The decision of the court below cannot be supported on the ground that the director was arbitrary in deciding under the circumstances that the election should not be invalidated by the employer's challenge; for the challenge came too late because of the employer's own neglect.

III

The conflict between the instant case and that of the Circuit Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *Capitol Greyhound Lines,* 140 F. 2d 754, certiorari denied, 322 U. S. 763, is, we believe, direct. Not only do

the two cases enunciate conflicting principles (see *supra*, p. 15), but the facts presented by the *Capitol Greyhound* case were identical with the facts of the instant case except that the employee, Nolan, whose vote, if cast for the union, was determinative of the election in that case had been hired for the first time subsequent to the eligibility date. The employer had apparently inadvertently supplied the regional director with the payroll for a period subsequent to that date. The Board held that the regional director's ruling barring the employer's post-election challenge was correct and neither arbitrary nor capricious, although Nolan was not in fact eligible to vote (49 N. L. R. B. 156, 158–159). The Circuit Court of Appeals enforced the Board's order, quoting with approval the paragraphs of the Board's decision in which the Board explained why it regarded the regional director's ruling as neither arbitrary nor capricious (140 F. 2d at 758) and pointing out that the Board's action was entirely within the broad discretion committed to it by Congress in the matter of determining employee bargaining agents (140 F. 2d at 759).

The court below in its opinion asserts a distinction between the facts of the *Capitol Greyhound* case and those in this case on the ground that there the ineligible voter was an employee at the time of the election, whereas here Mrs.

Kane was not (R. 107–108). It seems clear, however, that once the eligibility rules for an election are fixed, the number of days by which the voter misses the qualifying pay-roll period and the time relation of those days to the eligibility date, are immaterial. A voter is either eligible or ineligible. Just as Nolan would have been eligible if the Board had chosen a later date to determine eligibility, so would Mrs. Kane have been eligible if the Board had held this election a month earlier.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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DAVID A. MORSE,
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National Labor Relations Board.

MARCH 1946.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

SEC. 6. The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect

to rates of pay, wages, hours of employment, or other conditions of employment; *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * *

SEC. 10.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court

a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleading, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

The pertinent provisions of the Rules and Regulations of the National Labor Relations Board (Series 3, effective November 26, 1943) are as follows:

ARTICLE III

SEC. 12.

Hearing waived by stipulation; consent election agreements; consent cross-check agreements. * * *

After a petition has been filed and it appears to the Regional Director that an investigation should be instituted, the parties and any known individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the Regional Director, enter

into a consent election agreement or consent cross-check agreement leading to a statement by the Regional Director of the facts ascertained after such consent election or cross check but not resulting in a certification by the Board under Section 9 (c) of the Act. Such agreement shall include a determination of the appropriate unit, the time and place of holding the election, and the pay roll to be used in determining what employees within the appropriate unit shall be eligible to vote or to be counted. Such consent election or consent cross check shall be conducted under the direction and supervision of the Regional Director.

The method of conducting such consent election shall be consistent with the method followed by the Regional Director in conducting elections directed by the Board, pursuant to Section 9, Article III, of these Rules and Regulations, except that the rulings of the Regional Director shall be final, and the statement by the Regional Director of the results thereof shall be final. The method of conducting such consent cross check shall be set forth in the consent cross-check agreement. The rulings of the Regional Director on all matters shall be final, and the statement by the Regional Director of the results thereof shall be final.

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